clearly the rule in Connecticut: *Waite* v. *Pritchard*, 19 Conn. 212.

The language of the court in *The Bank of Montgomery* v. *Reese*, 2 Casey 147, certainly sustains this view of the proper measure of damages, which is certainly applicable to a case like the present, where the value is the highest at the time of trial. The jury took the highest value of the stock just preceding the trial, there being no later estimate submitted, and there is, therefore, no error under the charge of the court.

Judgment affirmed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF MASSACHUSETTS.[2]

SUPREME COURT OF NEW HAMPSHIRE.[3]

SUPREME COURT OF NEW YORK.[4]

SUPREME COURT OF VERMONT.[5]

COURT OF APPEALS OF KENTUCKY.[6]

Account Stated.

Where a factor has transmitted to his principal accounts of two different sales of the same goods, the principal, after having approved and recognised the first account, is not bound to notice, or object to, the second, at the peril of its being taken as a stated account, and held binding upon him: *Cartwright et al.* v. *Greene et al.*, 47 Barb.

Admiralty.

Practice—Depositions.—Depositions cannot be used on the trial of a suit in admiralty, which were taken in another suit concerning the same subject-matter, where the party against whom they are offered was not a party to the suit in which they were taken, nor privy to any such party, and had no right to cross-examine the witnesses: *Rutherford* v. *Geddes*, 4 Wallace.

---

[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 4 of his Reports.

[2] From Charles Allen, Esq., Reporter; to appear in vol. 12 of his Reports.

[3] From the Judges of the court. The cases will appear in 46 or 47 N. H. Rep.

[4] From Hon. O. L. Barbour; to appear in vol. 47 of his Reports.

[5] From W. G. Veazey, Esq., Reporter; to appear in vol. 39 Vt. Reports.

[6] From John L. Scott, Esq. The cases will appear in 2 or 3 Duval's Reports.

Nor can depositions be read in admiralty any more than at common law, without some sufficient reason being shown, why the witness was not produced at the hearing: *Id.*

Appeal.

Matters of Discretion.—An order directing that J. O., late sheriff, be made a party plaintiff, and that the summons, pleadings, &c., be amended by inserting therein the name of the said J. O., late sheriff, as a party plaintiff; and permitting the plaintiff to give to said sheriff, *nunc pro tunc*, the undertaking prescribed by section 238 of the Code, and to amend the complaint by inserting an allegation of such delivery, provides for an *amendment* of the original complaint. Such order is therefore a matter of *discretion*, and is not appealable: *Sayre* v. *Frazer et al.*, 47 Barb.

Banks.

Taxation by States.—Shares in banks, whether state banks or those organized under the Act of June 3d 1864, "to provide a national currency," &c., are liable to taxation by the state under certain limitations (set forth in section forty-first of the act), without regard to the fact that the capital of such banks is invested in bonds of the United States, declared, by statutes creating them, to be exempted from taxation by or under state authority: *Van Allen* v. *The Assessors*, 3 Wallace 573, affirmed: *People* v. *The Commissioners*, 4 Wallace.

If the rate of taxation by the state on such shares is the same as, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state:" *Id.*

Bills of Exchange.

By what Law to be governed.—A bill of exchange, payable in the city of New York, is, although it be drawn and accepted in the state of Indiana, a contract to be performed in New York, and is to be governed by the laws of that state: *Bright* v. *Judson*, 47 Barb.

Bonâ fide Holder.—Accepting a bill or note in payment of a precedent debt, is not parting with value, so as to make the holder a *bonâ fide* holder for value: *Id.*

Where an antecedent debt is evidenced by negotiable paper, it is not enough that new paper should have been received in payment and satisfaction of the old. To entitle the holder of the new paper to recover thereon, the old paper must be absolutely surrendered, before maturity, to the person from whom he received the new paper: *Id.*

Acceptance obtained by Fraud.—If the acceptance of a bill is obtained by fraudulent representations, such fraud is a bar to a recovery upon the bill by any person not a *bonâ fide* holder for value: *Id.*

Constitutional Law.

Retrospective Acts.—A statute which simply authorizes the imposition of a tax according to a previous assessment is not retrospective: *Locke* v. *New Orleans*, 4 Wallace.

Every retrospective act is not necessarily an *ex post facto* law: *Id.*

Such laws embrace only such as impose or affect penalties or forfeitures: *Id.*

Construction of Local Law by State Courts binding on Courts of the United States.—The Mexican Colonization Law of August 18th 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new state, as much so as if it had originated in her legislation. The interpretation, therefore, placed on it by the highest court of the state, must be accepted as the true interpretation, so far as it applies to titles to lands in that state, whatever may be the opinion of this court of its original soundness. If in courts of other states carved out of territory since acquired from Mexico, a different interpretation has been adopted, the courts of the United States will follow the different ruling, so far as it affects titles in those states: *Christy* v. *Pridgeon*, 4 Wallace.

The interpretation within the jurisdiction of a state, of a local law, becomes a part of that law, as much so as if incorporated in the body of it by the legislature. If different interpretations are given in different states to a similar law, that law, in effect, becomes, by the interpretations, so far as it is a rule for action by this court, a different law in one state from what it is in the other: *Id.*

Exemption of Lands from Taxation—Obligation of Contract by the State.—Where a state in order to promote the drainage and sale of certain swamp lands belonging to it, and which it was desirous of reclaiming, has passed, by way of encouraging purchasers, a law that such lands "shall be exempt from taxation for the term of ten years," and issued transferable scrip receivable for them, a repeal of the Exemption Act, so far as it concerns lands paid for either before or after the repeal, with scrip issued before the repeal, impairs a contract of the state with the holders of such scrip: *McGee* v. *Mathis*, 4 Wallace.

Corporations.

Taxation by States.—The legislature have power, by a general law, to require corporations organized here to pay to the treasurer of the Commonwealth a tax upon the excess of the market value of all the capital stock thereof over the value of their real estate and machinery taxable in the city or town where they are situated; and the fact that a corporation owns, as part of its personal property, bonds of the United States, and that a portion of its stockholders live in other states of the Union, will not exempt it from liability to pay the full amount of such tax: *Commonwealth* v. *Hamilton Manufacturing Co.*, 12 Allen.

This doctrine applies to mining corporations: *Id.*

Criminal Law.

Discharge on Habeas Corpus by reason of Writ of Error from a

Justice of the Supreme Court of the United States.—This court will not discharge on *habeas corpus* a prisoner convicted of crime in the Superior Court, and confined under sentence of imprisonment passed by that court, although a writ of error addressed to that court has been issued by a single justice of the Supreme Court of the United States, if no questions of law in the case were ever brought by exceptions or otherwise to this court for determination; but it will be assumed that the writ was improvidently issued, and will be dismissed: *Fleming* v. *Clark*, 12 Allen.

Writ of Error from Supreme Court of the United States.—A writ of error, duly and properly issued by a justice of the Supreme Court of the United States, in a criminal case which in final judgment and sentence have been given by a court of this Commonwealth, will operate as a *supersedeas* and stay of execution; but, before discharging the prisoner on *habeas corpus* in such a case, this court will require him to give sufficient bail to abide the final judgment which may be ordered by the Supreme Court of the United States: *Bryan* v. *Bates*, 12 Allen.

Larceny.—An indictment for larceny in a shop is sustained by proof that the defendant, with a felonious intent, obtained the property of another in the shop, by falsely personating the owner: *Commonwealth* v. *Collins*, 12 Allen.

Damages.

Attaching-Officer—Trespass by Owner.—The extent of damages which the attaching-officer, who sues the real owner for a trespass in unlawfully removing property from his attachment, may recover, is the amount of debt, costs, and interest due upon the execution, which the property was held to pay; and such trespasser not being a party to the execution cannot, because the officer's fees on the execution were not seasonably indorsed by items, object to their allowance as part of the damages: *Houston* v. *Howard*, 39 Vt.

Debtor and Creditor.

Sale of Chattels without Delivery—Levy by Creditors.—It is well settled in this state that a sale or pledge of chattels, which from their nature or situation it is not impracticable to move, will, if not accompanied by a manifest and substantial change of possession, be voidable by attaching-creditors: *Houston* v. *Howard*, 39 Vt.

The ostensible nature and purpose of a change of possession, as well as its duration, should be considered in determining whether it was so manifest and substantial as to be unprejudiced by a return of the property to the control and possession of the original owner: *Id.*

In March R. delivered all his assets, including two wagons, to H., to enable H. to realize out of their avails the payment of certain debts. H. sells part of them and applies on his debts. In June thereafter he allows the wagons to return to R.'s possession, although the debts were not fully paid, H. believing that he could not lose any rights by so doing. *Held*, that the wagons, after their return to R.'s hands and while in his possession, are attachable as R.'s property: *Id.*

The attachment would not be less valid because H. had been previously summoned as R.'s trustee on account of these wagons at the suit

of the creditor who makes the attachment; nor would its validity be altered by H.'s having become responsible for the debt, unless R. was also discharged: *Id.*

Property exempted from Execution—Sale of by Debtor.—The owner of property which is exempt from execution in Kentucky has the right to sell such property at his pleasure, and such sale passes the absolute title to the purchaser, without rendering the property liable to execution for the debts of the owner: *Anthony* v. *Wade*, Ct. of Appeals of Ky.

Such a sale is no fraud upon the creditors of the owner of the property, because the property gave no delusive credit to the owner, the law of exemption being sufficient notice to all creditors that the property was not subject to their demands: *Id.*

The exemption laws of Kentucky were passed for the benefit of the families of housekeepers, and a man who is in good faith a housekeeper in one county in Kentucky does not lose that character by removing with his family, and carrying exempted property, from one county to another in this state: *Id.*

He does not lose his character as housekeeper by "packing up" his goods for the purpose of removing with his family, and carrying the exempted property from Kentucky to the state of Tennessee: *Id.*

Property which is exempted from execution because the owner is a housekeeper, is also exempt from seizure under execution while *in transitu* from one county to another; also while *in transitu* from Kentucky to Tennessee: *Id.*

Ejectment.

Conclusiveness of Single Judgment.—A final judgment pronounced in an action of ejectment where the claim of title in fee simple absolute by the parties respectively was the sole subject of controversy, instituted and prosecuted under and according to the forms and in the manner prescribed by the statute laws of the state of Arkansas, that is to say, by a suit between the real litigants by name and where the land is accurately described, is a valid legal bar to a like action subsequently instituted between the same parties for the same lands or premises, involving the same identical title and rights to the possession of such lands or premises and none other: *Sturdy* v. *Jackaway*, 4 Wallace.

Semble. The doctrine is applicable generally in ejectments, in the form above described, in those states where no provision is made by statute for a subsequent trial: *Id.*

Eminent Domain.

Taking of Land by a Municipal Corporation for Streets.—The legislature have power to pass an act authorizing the mayor and aldermen of a city to take land for the widening and laying out of a street, and assess the cost of widening and grading the same, including damages for land and buildings taken therefor, upon the estates which will abut on the street after it shall have been laid out and widened, in proportion to their value at that time; giving to each owner of land so taken, if aggrieved by the doings of the mayor and aldermen, the right of trial by jury: *Dorgan* v. *City of Boston*, 12 Allen.

In ascertaining the compensation to be paid to an owner of land so taken, the legislature may provide that the mayor and aldermen shall

estimate the damages sustained, "including the value of the whole of the buildings on the land, and part of which shall be so taken, deducting therefrom, however, the value of the materials and of the buildings, if any, which will remain;" that the land shall be estimated at its value before the widening, and that such estimate shall not include the increased value occasioned merely by the widening, laying out, and grading of the street: *Id.*

The legislature may also provide, in such case, that the owner of any estate, a part of which shall be so taken, may, instead of claiming damages therefor, surrender his whole estate to the city, and that the mayor and aldermen shall thereupon estimate the value of the whole of the same, with the buildings, and the owner shall convey the same to the city, and the city shall pay to him the value so estimated: *Id.*

Execution.

Death of Party before Fi. Fa. issued.—A writ of *fieri facias* tested and issued after the death of the party against whom the judgment is recovered, is void, and confers no power on the ministerial officer to execute it: *Mitchell* v. *St. Maxent's Lessee*, 4 Wallace.

The rule applies where the proceedings are commenced by seizing property under a writ of attachment, under the laws of Florida, as at the common law: *Id.*

Factors.

Liability to their Principal.—A factor under a *del credere* commission becomes liable to his principal when the purchase-money is due. As between him and his principal, he then, in effect, becomes the purchaser, and is bound to pay not conditionally, but absolutely, in the first instance: *Cartwright et al.* v. *Green et al.*, 47 Barb.

Hence, after the factor has sold the goods, on credit, and sent an account of sales to his principal, the latter may recover the price of the goods of the factor, without showing that he has endeavored to collect the money of the persons to whom the factor sold the goods: *Id.*

And it is no defence to such an action that the sale made by the factor was an incomplete sale, so that, as between the factor and the purchaser, the former could not have enforced the same, and collected the money of the purchaser, in consequence of the want of some formality, or memorandum or entry in writing, or *actual* delivery; where the factor has, in his correspondence, treated the sale as complete and binding; has stated and transmitted an account of the net proceeds of the same; has promised to remit the proceeds; and has charged the purchaser, and credited his principal, in his books; and the sale has been recognised and approved by the principal: *Id.*

Not a Guarantor of Remittances.—*It seems* that the contract implied by a factor acting under a *del credere* commission does not make him a guarantor of the remittance: *Id.*

Fraud.

Upon Creditors.—A covinous note, given to defraud creditors, cannot be avoided, for the fraud, by the maker, but may, notwithstanding the fraud, be enforced against him: *Carpenter* v. *McClure*, 39 Vt.

The statute of Vermont, so far as it relates to the validity of contracts,

fraudulent as to creditors, seems to be merely declaratory of the common law: *Id.*

Prohibited contracts will not usually be enforced, but in this case the same statute which impliedly prohibits contracts fraudulent as to creditors, limits the invalidating effect of the prohibition to the "party or parties *only* whose right, debt, or duty is attempted to be avoided, their heirs, executors, or assigns": *Id.*

Contracts to defraud creditors are not less prohibited transactions because not forbidden by the express terms of the statute. The penalty implies prohibition: *Id.*

Lex Loci Contractus.

Interest.—On a consignment of goods by a merchant in New York, to a factor residing in California, for sale, the contract of the factor is to be performed in California, by remitting thence the proceeds of the sale, in the usual way; and in an action brought by the principal, to recover the proceeds, he is entitled to interest at the rate allowed by the laws of California: *Cartwright et al.* v. *Greene et al.*, 47 Barb.

Negligence.

Municipal Corporation—Irregularity in establishing the Street no Defence.—Where a corporation is sued for an injury growing out of negligence of the corporate authorities, in their care of the streets of the corporation, they cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the street originally: *Mayor* v. *Sheffield*, 4 Wallace.

If the authorities of a city or town have treated a place as a public street, taking charge of it, and regulating it as they do other streets, they cannot when sued for such injury, defend themselves by alleging want of authority in establishing the street: *Id.*

Officer of the United States.

What is a Suit against, under Act of Congress of 1833.—An indictment under the Gen. Sts. c. 87, for maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors, by one holding a license to sell such liquors under the Internal Revenue Law of the United States, is not a "suit or prosecution against any officer of the United States or other person for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title, set up or claimed by such officer or other person under any such law of the United States," which can be removed into the Circuit Court of the United States for trial, under the U. S. St. of 1833, c. 57, § 3: *Commonwealth* v. *Casey*, 12 Allen.

Pardon.

Before Conviction.—The Constitution of Kentucky invests the governor with the general power of pardoning all offences against the law, and he may exercise this power either *before* or *after* trial and conviction, and his pardon must be allowed by the courts: *Commonwealth* v. *Ashlock*, Ct. of Appeals of Ky.

Partnership.

Lands held as Partnership Property—Double Partnership—Death of one Partner.—A. and B. were partners, A. carrying on the business of the firm in Boston, and B. in New Orleans. A. took in C. as a partner in the business carried on in Boston, and A. and B. agreed in writing that after a settlement with C. all the business in Boston should be settled by the articles of agreement between A. and B. Real estate was afterwards acquired by A. and C. in Massachusetts and other states, with partnership funds, and was agreed to be treated as partnership property. A. died. *Held*, that the administratrix of his estate could not maintain a bill in equity to compel C. to sell said real estate as surviving partner, and to account to her directly for the proceeds; but that B., as surviving partner of the original firm, had a right to insist on C.'s accounting with him therefor: *Shearer* v. *Paine and Others*, 12 Allen.

Practice.

Pleas—New Trial.—Whatever system of pleading may be adopted in a court below, it can hardly justify or require the court to give an instruction contrary to law; especially where the plea relied on as the ground for such instruction constitutes no defence to the action, but is frivolous and would be stricken from the record on motion: *United States* v. *Dashiel*, 4 Wallace.

Where a plea in answer is but notice of special matter by way of abatement of the amount claimed and so goes to but part of the cause of action, it cannot be relied on as a plea in bar: *Id.*

A motion for a new trial is not a waiver of exceptions: *Id.*

Bill of Exceptions.—When a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions, otherwise it will be disregarded: *Leftwitch* v. *Lecanu*, 4 Wallace.

That a copy of a paper is attached to a pleading in the case, which purports to be the same as the paper, mentioned in the bill of exceptions, does not make it a part of that bill, nor can this court presume that it is the same paper read in evidence and excepted to: *Id.*

Prohibition.

When the Writ may issue.—The writ of prohibition can only be used to prevent the doing of some act which is about to be done, and can never be used as a remedy for acts already completed: *United States* v. *Hoffman*, 4 Wallace.

Therefore where the court to which the writ should be issued has already disposed of the case, so that nothing remains which that court can do, either by way of executing its judgment or otherwise, no prohibition will be granted: *Id.*

And this is true, though the final disposition of the case was made after service on the judge of a rule to show cause why the writ should not issue, and though other cases of the same character may be pending in the same court: *Id.*

Public Lands.

Pre-emption Claimant.—The equity of a pre-emption claimant of land under the laws of the United States who has complied with the conditions imposed by those laws, obtained his certificate by the payment of the purchase-money, and retained uninterrupted possession of the property, cannot be defeated by one whose entry was subsequent, although he has fortified his title with a patent; such person having notice sufficient to put him on inquiry as to the interests, legal or equitable, of the pre-emption claimant: *Hughes* v. *United States*, 4 Wallace.

A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit: *Id.*

A court of equity will set aside a patent of the United States obtained by mistake or inadvertence of the officers of the land office, on a bill filed for that purpose by the government, when the patent *primâ facie* passes the title: *Id.*

Open, notorious, and exclusive possession of real property by parties claiming it is sufficient to put other persons upon inquiry as to the interests, legal or equitable, held by such parties; and if such other persons neglect to make the inquiry they are not entitled to any greater consideration than if they had made it and had ascertained the actual facts of the case: *Id.*

Public Officer.

Action against.—An action to recover damages for a tort will lie against a public officer acting by independent authority, and not merely as an agent, for a violation of a ministerial duty absolute, certain, and imperative in its nature, imposed upon him by law, and specifically due to a particular individual, as distinguished from the whole public: *Clark* v. *Miller*, 47 Barb.

A highway having been laid out by the commissioners of highways, through the plaintiff's farm, commissioners appointed by the county court assessed his damages at $185. On appeal from this assessment, a jury re-assessed the damages of the plaintiff at $355. The defendant, being supervisor of the town, was requested by the plaintiff to lay this last assessment before the board of supervisors, which the defendant refused to do, claiming that the re-assessment was invalid and illegal *Held*, that for this refusal to perform a duty imposed upon him by law, an action could be maintained against the defendant, by the plaintiff, to recover the damages caused by such refusal: *Id.*

Measure of Damages, in such an Action.—The measure of damages, in such an action, is the amount of the assessment which the defendant refused to lay before the board of supervisors, interest and costs: *Id.*

Seduction.

Action for.—The action for seduction has its foundation in the relation of master and servant; and loss of service, or actual injury to the plaintiff's rights as master, must be averred and proved: *Ingersoll* v. *Miller*, 47 Barb.

Proof necessary.—The action is not maintainable upon the mere relation of parent and child. Proof of seduction, merely, is not sufficient; but the plaintiff must show that a direct injury to his rights as master resulted therefrom: *Id.*

But proof of the slightest loss of service, or the most trifling injury, if the direct result of the wrongful act, is sufficient to uphold the action: *Id.*

When action for, lies.—Mere seduction, without pregnancy, consequent ill health, or injury to the servant, will not give the right of action: *Id.*

But when pregnancy, and consequent incapacity for physical exertion and endurance, follow from the wrongful act, the technical requirement of the law in regard to actual loss, or injury to the master's rights, is met and answered: *Id.*

In such a case, sickness and temporary if not permanent derangement of the system, being the necessary result, it becomes, as matter of law, an injury of which the master, as such, may complain: *Id.*

It is no objection to the maintenance of the action that no expense, or actual loss of services to the plaintiff, is proved. It is sufficient that the father was, at the time, *entitled* to the services of the daughter, and *might* have required them, had he chosen to do so: *Id.*

If there has been a wrongful interference with his right to his daughter's services, and he could not have obtained them had he required them, at least not to the same extent as if pregnancy had not existed, there is a positive injury to the plaintiff's rights, equally available, as a ground of action, with actual loss of service: *Id.*

The master has a property in the labor of his servant, and any wrongful act creating or producing a disability in the servant to perform what the master has a right to require, operates as a disturbance or infringement of such right, to which the law will attach at least nominal damages: *Id.*

The minor daughter of the plaintiff, having been seduced by the defendant, became pregnant, and died suddenly, about four months after conception. A *post mortem* examination disclosed a dead *fœtus*—also a congested brain, caused by nervous excitability or extreme mental agitation, or both. At the time of the seduction, and until her decease, the daughter resided with her father, except when employed as a school-teacher, under a contract made with him. She was thus employed at the time of her decease. *Held*, that an injury to the plaintiff's rights was proved, clearly giving him a right of action: *Id.*

And that the court was right in refusing to dismiss the complaint on the objection that there was no proof of any loss of services, as a consequence of the seduction: *Id.*

Damages.—The question of damages, in an action for seduction, is for the jury; and if they find a verdict for the plaintiff for $5000, the amount will not be deemed so extravagantly excessive as to imply partiality, corruption, or undue influence, or authorize the court to interfere with the verdict: *Id.*

Supreme Court of the United States.

Jurisdiction.—In a case brought here from a state court under the 25th section of the Judiciary Act, the record must show that some one of the matters mentioned in that section was necessarily decided by the court, notwithstanding there may be a certificate from the presiding judge that such matters were drawn in question: *Railroad Co.* v. *Rock*, 4 Wallace.

If it appears from the record that the state court might have decided the case on some other ground, this court has no jurisdiction: *Id.*

This court cannot reverse the decision of a state court upon the general ground, that that court has declared a contract void which this court may think to be valid: *Id.*

It must be the constitution or some statute of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the constitution or laws of the United States; and the decision of the state court must sustain the law of the state in the matter in which this conflict is supposed to exist, or the case for this court does not arise: *Id.*

The jurisdiction of this court to re-examine judgments of the Circuit Courts, is limited to cases where the matter in dispute exceeds $2000. Where it but equals that sum the jurisdiction does not exist: *Walker* v. *United States*, 4 Wallace.

SURETY.

Discontinuance of Attachment against Principal.—A creditor who has commenced an action against the principal upon a promissory note, may discontinue it without prejudice to his rights against the sureties, although property of the principal may have been attached therein: *Eleazar Barney* v. *Josiah Clark*, Sup. Ct. N. H.

In such a case the mere facts that the creditor being the payee of the note and knowing the relation of its signers, had, before the discontinuance of his action in answer to the inquiry of the principal, informed him that the note was secured by the attachment, and that the principal had given this information to the surety, and in consequence of it had neglected to secure the surety, will not estop the creditor or a subsequent indorsee of the note from afterwards collecting it of the surety: *Id.*

Where a payee of the note received of A., who was not a party to it, its amount, and A. took the note, which was subsequently at his request indorsed by the payee: *Held*, that there was evidence of a sale of the note by the payee to A., although the former did not understand that he was making a sale at the time when he received the money and A. first took the note: *Id.*

TAXATION.

Power of States over Land as a Subject of Taxation.—The different states, as a general rule, have the right of determining the manner of levying and collecting taxes on private property within their limits; and can declare that a tract of land shall be chargeable with taxes, no matter who is the owner, or in whose name it is assessed and advertised; and that an erroneous assessment does not vitiate the sale for taxes: *Witherspoon* v. *Duncan*, 4 Wallace.

Lands originally public cease to be public after they have been entered at the land office, and a certificate of entry has been obtained: *Id.*

Lands so entered are liable to taxation; and if the taxes remain unpaid, they may be sold like other lands, even though no patent may as yet have issued: *Id.*

The right of tax attaches as well to donation entries as to cash entries; the particular land in either case, when the entry is made and certificate given, being segregated from the mass of public lands, and becoming private property: *Id.*

TENDER.

If the defendant in offering the money which he claims to have tendered plaintiff, had in substance told plaintiff, that if he took it it must be in full, the offer would have been conditional and invalid as a tender. Its acceptance would have amounted to accord and satisfaction: *Foster* v. *Drew et al.*, 39 Vt.

But the language used in making the tender must be interpreted as it was used with relation to the previous transactions between the parties, to determine correctly whether its effect is to affix a condition to the offer, or merely to explain what the defendant claims and intends that the tender will cover: *Id.*

The defendant had been offering plaintiff $170, which was due plaintiff by reason of a transaction about some oats. The defendant all the while stated, that if plaintiff took it the plaintiff would still owe the defendant a store account of $41.78. Finally, the defendant tendered plaintiff $130 in currency, "and supposed, and told the plaintiff, that if the plaintiff took the $130, it closed the *whole* business; and if he took the $170, it settled the *oat* business and left the account standing." *Held*, that the offer of $130 was valid as a tender, and the defendant's language, instead of affixing a condition to his offer of that sum, merely explained his claim and what he meant his tender to cover: *Id.*

TRUST.

Devise to a Class with Power of Selection in the Trustee.—Where a will gave to a trustee the residue of testatrix's estate, with directions to dispose of it for the benefit of her brothers and sister, as he might, from time to time, judge the testatrix would have done if she could have foreseen the circumstances, and expressing entire confidence in the discretion of the trustee—it was *held*, that a trust was not created for the benefit of each brother and sister equally; but that the fund was to be applied for the benefit and comfort of the beneficiaries, at such times and in such proportions as the trustee, in the exercise of a sound discretion, and in view of their respective needs, should judge best to accord with the purposes of the donor: *City of Portsmouth* v. *Shackford et al.*, Sup. Ct. N. H.

Held, also, that if there be a gift to one, in trust for a class of persons, with a power of selection, a court of equity will not interfere with its exercise by the trustee, so long as it is governed by a sound discretion and is in accordance with the will of the testator,—although, if the trustee die without having exercised this power, the court, in distributing the fund, will ordinarily be governed by the Statute of Distribution, unless the provisions of the will indicate a different distribution. Whether in this case there is an unlimited power of selection, so that the trustee might appoint the whole fund to one or more of the brothers and sister, *quære*. Under the provisions of this will, the trustee may, in his discretion, rightfully expend the entire capital for the benefit of the brothers and sister: *Id.*

If those brothers and sister were all in equal need, and other things were equal, a sound discretion would require an equal distribution of the fund. Where the income of the fund for one year, being about $240, was expended by applying to one brother $100, to another $111.51, to the other nothing, and to the sister, who was wholly destitute and in the

almshouse, and also *non compos*, $24.56: *Held*, that in respect to the sister, there was no such abuse of the trustee's discretion, as to cause the court to interfere: *Id.*

Vendor and Purchaser.

Whether the Title passes.—The plaintiff agreed, orally, to purchase of the defendant twenty-three hundred bushels of wheat, then in store in an elevator, and paid him the price. The wheat was in bulk, mixed with a larger quantity belonging to the defendant and others, and was not separated from the mass in store, nor was any manual delivery made, or bill of sale executed, or order given to the plaintiff on the keeper of the elevator. About sixteen hundred bushels were destroyed by fire in the elevator before it was removed by the plaintiff. The jury having found that the title did not pass, but that the wheat remained the property of the vendor, and at his risk: *Held*, that the contract operated as a contract to sell, and was not a transfer of the title; and that the plaintiff was entitled to recover the value of the wheat remaining undelivered at the time of the fire: *Rodee* v. *Wade*, 47 Barb.

Specific Performance of Contract for Sale of Land.—The granting of a specific performance of a contract for the sale of land, is not a matter of right, to which the party is entitled when he has proved his contract, but is always a matter of sound and reasonable discretion on the part of the court, in view of all the circumstances of the case: *Eastman* v. *Plumer et al.*, Sup. Ct. N. H.

In exercising this sound discretion, the court will not decree a specific performance, in cases of fraud or mistake, or of a hard and unreasonable bargain, or in case of great inadequacy or exorbitancy of price, or where the decree would in any way produce injustice: *Id.*

Those who desire to secure the aid of equity in enforcing the performance of contracts, must show a willingness and a readiness to perform and abide by them: *Id.*

If either party to a contract of sale, fails or refuses to claim or act under the contract for such a length of time, as to give the impression that he has waived or abandoned the sale or purchase, and especially, if the circumstances justify the belief that his intention was to perform the contract only in case it suited his interest, he will necessarily forfeit all claim to equity: *Id.*

There are many equitable considerations not amounting to illegality or actual fraud in the contract, which may properly induce a court of equity to refuse to decree a specific performance of the contract, and to leave the party to his remedy at law for a non-performance, which would not be sufficient to warrant the court in setting aside the contract of sale: *Id.*

There are few cases in which courts of equity will insist on the maxim, that he who seeks equity must do equity, with more rigor than in those of suits for specific performance of contracts: *Id.*

Ordinarily, a party who has once elected to rescind a contract, and sought to repudiate it and failed, will not afterwards be heard when he calls on equity to decree specific performance of such contract: *Id.*

Of Chose in Action—Equities against the Purchaser.—The rule that a *bonâ fide* purchase for value and without notice of prior equities is a

good defence, is held to apply only to cases where the purchaser has obtained a legal title or a legal superiority and advantage, in good faith and for value: *Downer* v. *South Royalton Bank*, 39 Vt.

The assignee of a *chose in action* takes it subject not only to all equities between the assignor and debtor, but to equities residing in a third person against the assignor. The cases which *seem* to hold otherwise are peculiar and exceptional: *Id.*

The general rule with reference to equitable assignments and assignments of equities is laid down as follows:—When the equity is binding on the assignor, those who buy from him subsequently will necessarily be bound in the same manner, and can acquire no greater or better right than he had to sell or part with. When, therefore, the assignment or transfer of a *chose in action* is in question, priority in point of time will give priority of right, unless there are some special circumstances, other than good faith and the payment of value, to justify or require a different conclusion: *Id.*

Where a deputy recovered judgment against a bank for money deposited, which he had collected on an execution, the equitable title to the money and to the judgment was in the execution-creditor, until his claim against the sheriff for the *laches* of his deputy was paid by the sheriff. Upon such payment the sheriff was entitled to be subrogated to the right of the execution-creditor: *Id.*

A sale of the judgment by the deputy transferred no legal title; it conveyed at most but an equitable right: *Id.*

The law of Congress making treasury notes a legal tender, held constitutional: *Carpenter* v. *Northfield Bank*, 39 Vt.

United States Legal Tender notes, so called, are a valid tender in payment of the bills of a state bank: *Id.*

LIST OF NEW LAW BOOKS RECEIVED BY THE PUBLISHERS OF THE AMERICAN LAW REGISTER.

American Law Review.—Vol. I., No. 3, April 1867. Boston: Little, Brown & Co. $5 per annum.

Clarke & Co.—General Law Catalogue of Robert Clarke & Co., Law Booksellers, Publishers, and Importers. Cincinnati, 1867. 8vo. pp. 129.

James.—The Bankrupt Law of the United States 1867, with notes and a collection of American and English decisions upon the Principles and Practice of the Law of Bankruptcy. By Edwin James, of the New York Bar. 8vo. pp. 325. New York: Harper & Brothers, 1867.

Michigan.—Reports of Cases decided in the Supreme Court of Michigan. William Jennison, Reporter. Vol. I., being Vol. XIV. of the Series. Detroit: W. A. Throop & Co., 1867.

Wisconsin.—Reports of Cases argued and determined in the Supreme Court of Wisconsin, with Tables of the Cases and Principal Matters. By O. M. Conover, Official Reporter. Vol. XIX. Containing the Cases decided at the January Term 1865, and most of the Cases decided at the June Term 1865. Madison, Wis.: Atwood & Rublee, Printers, 1866.